

FILED
BILLINGS DIV.

2009 APR 27 PM 2 09

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION
K E. DUFFY, CLERK
DEPUTY CLERK

PACIFICORP,)	CV-06-122-BLG-RFC-CSO
)	
Plaintiff,)	
)	
vs.)	
)	
Easement and Right of Way Across:)	ORDER ADOPTING
T 2 S, R 2 8E, MPM, Section 4: E $\frac{1}{4}$ SE $\frac{1}{4}$)	FINDINGS AND
Section 10: W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$)	RECOMMENDATIONS
Section 14: SW $\frac{1}{4}$ NW $\frac{1}{4}$)	OF UNITED STATES
T 4 S, R 29 E, MPM,)	MAGISTRATE JUDGE
Section 15: NE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$)	
Section 16: E $\frac{1}{2}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$)	
T 5 S, R 29 E. MPM, Section 10: S $\frac{1}{2}$,NE $\frac{1}{4}$ NE $\frac{1}{4}$,)	
S $\frac{1}{2}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$)	
T 6 S, R 31 E, MPM, Section 26: NE $\frac{1}{4}$ NE $\frac{1}{4}$)	
Section 36: NW $\frac{1}{4}$ NE $\frac{1}{4}$)	
T 7 S, R 32 E, MPM, Section 14: SW $\frac{1}{4}$ SE $\frac{1}{4}$)	
Section 24: N $\frac{1}{2}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$)	
T 7 S, R 33 E, MPM Section 19: SW $\frac{1}{4}$ SW $\frac{1}{4}$)	
Section 30: NE $\frac{1}{4}$ SE $\frac{1}{4}$)	
in Bighorn County, Montana, Consisting of)	
Approximately 33.4 Acres,)	
HENRY REAL BIRD, et al. And Unknown Owners,)	
UNITED STATES OF AMERICA,)	
)	
Defendants.)	
)	

On September 12, 2008, United States Magistrate Judge Carolyn Ostby entered Findings and Recommendation (*doc. 107*) with respect to PacifiCorp's Motion for Partial Summary Judgment Regarding Right to Take Property (*doc. 77*); Real Bird's Motion for Summary

Judgment (*doc. 85*); and PacifiCorp's Motion to Stay Collateral Proceedings and for Order of Continuing Possession (*doc. 81*).

Upon service of a magistrate judge's findings and recommendation, a party has 10 days to file written objections. 28 U.S.C. § 636(b)(1). In this matter, Defendants filed an objection on September 21, 2008. Plaintiff responded to Defendants' objections on September 23, 2008. Defendants' objections require this Court to make a *de novo* determination of those portions of the Findings and Recommendations to which objection is made. 28 U.S.C. § 636(b)(1). Defendants' objections are not well taken.

After a *de novo* review, the Court determines the Findings and Recommendation of Magistrate Judge Ostby are well grounded in law and fact and HEREBY ORDERS they be adopted in their entirety.

First, with regard to PacifiCorp's Motion for Partial Summary Judgment (*doc. 77*), the Real Birds were not able to set forth any facts showing that there is a genuine issue of fact regarding PacifiCorp's right to take. Accordingly, PacifiCorp has a right to take the subject property under Montana law and issuance of a preliminary condemnation order is appropriate.

Second, after reviewing Real Bird's Motion for Summary Judgment (*doc. 85*), it is apparent that the Real Birds did not set forth any affidavits or evidentiary facts to support their motion.

Finally, with regard to PacifiCorp's Motion to Stay Collateral Proceedings and for Order of Continuing Possession (*doc. 81*), the Judge Ostby correctly concluded that PacifiCorp is entitled to an order of continuing possession, subject to the condemnation proceeding, and to a stay of all pending actions and proceedings against PacifiCorp on account of its possession of the

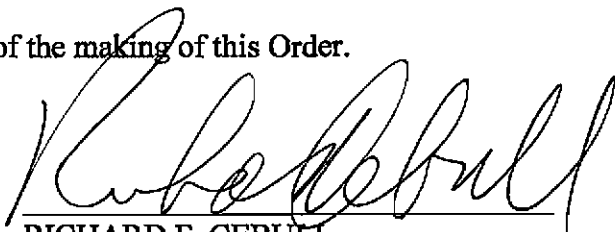
subject property until final conclusion of the condemnation proceeding. This order of continuing possession is directed to the Real Bird allotments 0463-A and 3602. Further, as ordered in *PacifiCorp v. Real Bird*, CV-07-14-BLG-RFC, any trespass claims the Real Birds have against PacifiCorp for use of Indian Reservation Road 52 are not part of the property subject to this condemnation proceeding, and are not stayed on account of this order.

Accordingly, **IT IS HEREBY ORDERED** as follows:

1. PacifiCorp's Motion for Partial Summary Judgment Regarding Right to Take Property (*doc. 77*) is **GRANTED** as set forth herein;
2. Real Bird's Motion for Summary Judgment (*doc. 85*) is **DENIED**; and
3. PacifiCorp's Motion to Stay Collateral Proceedings and for Order of Continuing Possession (*doc. 81*) is **GRANTED** as set forth herein.

The Clerk of Court shall notify the parties of the making of this Order.

DATED this 27 day of April, 2009.



RICHARD F. CEBULL
UNITED STATES DISTRICT JUDGE